Supreme Court, U.S.
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92-1567

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

JUANITA S. BROWN,

Petitioner,

v.

INSHIRAH FARHOUD and
GERMANTOWN MUTUAL INSURANCE COMPANY,

Respondents.

Petition for Writ of Certiorari to the Wisconsin Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Are the Due Process and Equal Protection Clauses of the Fourteenth Amendment violated by Wisconsin's statutory scheme and its case law interpretation of that statutory provision, which permits a judge to continue to preside over a case on the judge's mere assertion of impartiality despite a documented history of partiality against litigant's attorney?

PARTIES BELOW

The names of all parties to the proceedings in the Wisconsin Supreme Court appear in the caption of the case. The Petitioner does not have a parent company or any subsidiaries.

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OPINIONS BELOW

The Order from the Wisconsin Supreme Court denying the Petitioner's Petition for Review is reproduced in the Appendix to this Petition at App. 1-3. The decision of the Wisconsin Court of Appeals denying the Petitioner's motion to vacate the Court of Appeals opinion filed February 2, 1992 is reproduced in the Appendix to this Petition at App. 4-9.

JURISDICTION

The order by the Wisconsin Supreme Court denying the Petition for Review is dated December 23, 1992. 28 U.S.C. § 1257(a) confers jurisdiction on this court to review the judgment in question by *writ of certiorari.*

Since this petition draws into question the constitutionality of a statute of the State of Wisconsin a copy of this petition is being served on the Attorney General of Wisconsin, pursuant to 28 U.S.C. § 2403(b).

CONSTITUTIONAL PROVISION

U.S. Const. amend. XIV, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner, Juanita Brown (Brown) instituted a lawsuit in a Wisconsin state court for personal injuries she received as a result of the negligence of the respondent, Inshirah Farhoud. Following an unfavorable ruling to Brown by the trial court involving a question of remittitur on a damage award to Brown, she appealed her case to the Wisconsin Court of Appeals. The attorney representing Brown in the trial court and before the Wisconsin Court of Appeals at the time of Brown's appeal from the trial court's

decision was Attorney Gerald R. Turner (Turner). A three judge panel of the Wisconsin Court of Appeals decided adversely to Brown in a two to one decision dated February 4, 1992; Judges Ralph Adam Fine and William R. Moser in the majority. Judge Michael T. Sullivan dissented.

On July 17, 1992, Brown filed a motion in the Wisconsin Court of Appeals requesting it to vacate its decision of February 4, 1992. In sum, the basis for Brown's motion was that Judge Fine should not have participated in and decided the appeal released on February 4, 1992 due to Judge Fine's repeated recusals and disqualifications from all cases in which Turner was involved stretching over nine years and at least six cases while Judge Fine was a trial court judge. Brown provided documentary evidence and affidavits which unequivocally showed that Judge Fine *had recused himself* from every case in which Turner was involved beginning in the early 1980s and stemming from a confrontation between Judge Fine and Turner in 1981. (Emphasis added) Brown further contended that had Judge Fine been disqualified from the February 4, 1992 decision, it may not have been adverse to Brown as Judge Fine was part of the two judge majority and the issue was one of law in which the court did not owe deference to the trial court's decision.

In an opinion released on October 6, 1992, the Wisconsin Court of Appeals denied Brown's motion to vacate its February 2, 1992 decision finding that because Judge Fine himself had determined (as an addendum to the October 6, 1992 decision) that he could act impartially on the appeal, the requirements of § 757.19(2)(g), Wis. Stats. and *State v. American TV & Appliance of Madison, Inc.*, 151 Wis. 2d 175, 443 N.W.2d 662 (1989) had been met. App. 4-9. Section 757.19(2)(g), Wis. Stats. says:

> **Disqualification of judge. . . .**
>
> (2) Any judge shall disqualify himself or herself from any civil or criminal action or proceeding when one of the following situations occurs:
>
> * * *
>
> (g) When a judge determines that, for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner.

No consideration was given by the Wisconsin Court of Appeals to the due process objective analysis as stated in prior Wisconsin Supreme Court opinions nor to the Wisconsin case law which says a litigant should not be placed in the position of having to ask a judge to recuse himself/herself. *State v. Carviou*, 154 Wis. 2d 641, 646, 454 N.W.2d 562 (Ct. App. 1990). The objective analysis requires disqualification on the "appearance" of partiality.

On November 5, 1992, Brown filed her Petition for Review of the Wisconsin Court of Appeals' October 6, 1992 decision to the Wisconsin Supreme Court. Brown argued that Wisconsin case law guarantees litigants a decision by a fair and impartial judge. She argued that it was necessary to determine whether there was an "appearance" of a judge's partiality or whether partiality could reasonably be questioned. Brown asserted her constitutional rights were denied because this analysis was not entertained by operation of § 757.19(2)(g), Stats., which permits a judge to resolve the question of bias simply by saying "I'm not biased."

On December 23, 1992, the majority of the Wisconsin Supreme Court ordered that Brown's Petition for Review be denied with Justice Shirley S. Abrahamson dissenting. App. 1-3. The Wisconsin Supreme Court provided no reason for denial of Brown's Petition.

REASONS FOR GRANTING THE WRIT

THE HIGHEST WISCONSIN STATE COURT DECIDING THE ISSUE OF DISQUALIFICATION HAS FAILED TO AFFORD THE DUE PROCESS OF LAW AND EQUAL PROTECTION OF LAW GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Due process of law requires, among other things, that a trial be had, or a decision be made, before a fair and impartial judge. *In re Murchison*, 349 U.S. 133, 136 (1955); *State v. Walberg*, 109 Wis. 2d 96, 105, 325 N.W.2d 687 (1982). In conformance with these principles, Wisconsin has guaranteed a litigant, since at least the 1970s, a judge who not only says he or she is impartial and unbiased but a judge who "appears" to be impartial and unbiased. *Walberg*, 109 Wis. 2d at 106; *State v. Asfoor*, 75 Wis. 2d 411, 436, 239 N.W.2d 529 (1977). The "appearance" of impartiality test has been referred to by *Walberg* as the "objective test." *Walberg*, 109 Wis. 2d at 106.

A litigant's right to a judge who "appears" impartial is also guaranteed by the Wisconsin Code of Judicial Ethics. In Wisconsin Supreme Court Rule 60.01(3) it is stated, "A judge should administer the law free of partiality and the appearance of partiality."

Moreover, this Court has stated in varying contexts that a litigant is entitled to a judge who appears fair and impartial so as to satisfy the litigant's due process rights. *See Liljeberg v. Health Services Corp.*, 486 U.S. 847 (1988); *Aetna Life Insurance Company v. LaVoie*, 475 U.S. 813 (1986); *In re Murchison*, 349 U.S. 133 (1955).

Finally, the United States Congress considered the importance of having a judge (albeit a federal judge) who appears to be impartial presiding over a case when it en-

acted 28 U.S.C. § 455 which provides in part, "[A judge] shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

Despite the due process guarantees stated herein, Brown was denied these basic rights. As evidenced by the Wisconsin Court of Appeals decision, Judge Fine made his own determination that he was impartial and, based upon the Wisconsin Court of Appeals interpretation of the state of the law on disqualification in Wisconsin, Judge Fine was able to preside over the decision which was adverse to Turner's client. There was no objective due process analysis. There was no consideration by another judge or panel of judges as to whether there was an appearance of partiality or whether impartiality might reasonably be questioned which should disqualify Judge Fine from presiding over the appeal. The Wisconsin Court of Appeals relied upon § 757.19(2)(g), Wis. Stats. and that statute's interpretation by the Wisconsin Supreme Court in *American TV*, 151 Wis. 2d at 186, without regard to the objective analysis stated above. App. 4-9.

The statutory escape hatch of § 757.19(2)(g), Wis. Stats. creates a presumption of fairness and constitutionality which is illusory. It puts the burden on the petitioner to prove a negative. Despite an objective history which speaks for itself, the judge is permitted to say, "I was biased before. I'm not any longer, trust me," and the litigant has no choice but to accept that representation.

The unfairness of the process as applied to Brown is readily apparent when one considers the history of the relationship between Judge Fine and Turner. This history evidences an unbending practice by Judge Fine since the early 1980s while he sat on the trial court bench *to recuse himself from all cases in which Turner had appeared.*

(Emphasis added) This practice demonstrates that not only had Judge Fine already determined that he could not act impartially on any case in which Turner was involved, but demonstrates an overwhelming "appearance" of partiality. Turner never sought Judge Fine's disqualification. Turner never knew when a case was assigned to Judge Fine whether the judge would disqualify himself. Judge Fine disqualified himself on every case in which Turner was the attorney over a nine year period preceding the filing of Brown's appeal. Turner was constantly in the position of having to wait for the other shoe to drop. When the Brown case went to Appeals Court Turner had reason to reliably anticipate that Judge Fine would once again recuse himself. Turner shouldn't have had to ask Judge Fine whether he was going to recuse himself nor should he have to seek Judge Fine's disqualification. To place a litigant in that situation is unconscionable. *State v. Carivou, supra.*

As this petition was going to print, Turner received a decision of the Wisconsin Appeals Court District I, written by Judge Fine. It has been attached hereto as App. 10-11. Turner had another case, *Lukowski v. Dankert*, No. 92-2369 (Wis. Ct. App. March 16, 1993), which he recently appealed. Turner asked Judge Fine to recuse himself from the panel that might hear the case. Judge Fine refused citing the decision from the Court of Appeals in this case. A situation has now been created whereby the judge continues to review his or her own decisions. There is no independent reviewer of the decision of the judge who despite a history of self-proclaimed partiality says, "I am no longer biased".

Turner poses this question, can a judge who has been admittedly biased against an attorney review his own bias on the question of self-recusal, without being biased? The

due process and procedural irregularity of this system is patent and contrary to the development of our liberty. *Burdeau v. McDowell*, 256 U.S. 465, 477 (1921).

Similar due process irregularity was the basis for this Court's decisions in *Mayberry v. Pennsylvania*, 400 U.S. 455, 464-465 (1971); *Johnson v. Mississippi*, 403 U.S. 212, 215-216 (1971), and *Taylor v. Hayes*, 418 U.S. 488, 500-501 (1974), which held that the question of contempt, whether or not involving a personal attack on the judge, should be adjudicated by another judge. This procedural regularity was held to be essential to due process. It should be no less the case here.

The failure of the highest Wisconsin court deciding this issue of disqualification to consider the objective, "appearance of partiality test" was a denial of due process guaranteed to Brown by the Fourteenth Amendment to the United States Constitution. In failing to consider Brown's Petition for review, the Wisconsin Supreme Court has declined to address this important issue involving constitutional rights.

In its ruling in *American TV, supra*, the Wisconsin Supreme Court has given its imprimatur to a statutory scheme which totally disregards Wisconsin's objective appearance of partiality test of *Walberg, supra*, and that set forth by the U.S. Supreme Court to pass constitutional muster in *Liljeberg, Aetna Life* and *Murchison, supra*. The combination of § 757.19(2)(g) and the interpretation of it in *American TV*, worked to violate Brown's constitutional right to due process of law.

By providing some litigants with a two step analysis as to when a judge should be disqualified, that is, a sub-

jective *and* objective analysis, i.e., *Walberg*, 109 Wis. 2d at 106, the Wisconsin Court of Appeals by determining that Judge Fine should not be recused applying only the subjective analysis, denied Brown her right to equal protection under the law.

CONCLUSION

Brown was denied her right to a fair and impartial judge and to due process guaranteed by the Fourteenth Amendment to the United States Constitution. Despite overwhelming evidence of partiality and a history of predetermined personal disposition of partiality, Judge Fine did not recuse himself. In response to Turner's objection to that decision the Wisconsin Court of Appeals ruled that since Judge Fine had, after the fact, stated that he wasn't biased, (despite all the objective evidence to the contrary) that that such a determination satisfied § 757.19(2)(g), Wis. Stats., and its interpretation in *American TV supra*. Due process guarantees a litigant a fair and impartial judge. Brown was denied this right because the same judge who had disqualified himself in every case her lawyer appeared on over a nine year period decided not to recuse himself on her case, saying effectively "ignore the history I am no longer biased against your attorney." The result turned out to be sadly predictable. Judge Fine was in a two to one majority on an issue to which the appeals court owed no deference to the findings and rulings of the trial court.

Moreover, providing some litigants with the benefit of recusal of a judge who "appears" to be partial, *Walberg, supra* while denying Brown the same benefit because the judge says he's not biased violates her rights to equal

protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution.

Certiorari should be granted.

Dated: March 23, 1993.

Respectfully submitted,

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